Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

WILLIAM E. DERRYBERRY,

Petitioner,

-versus-

TENNESSEE VALLEY AUTHORITY;
UNITED STATES OF AMERICA,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED REVIEW

1. WHETHER COST-BENEFIT STUDIES APPROVED BY CONGRESS ARE SUBJECT TO JUDICIAL REVIEW AFTER THE INTENDED PROJECT HAS FAILED?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is set forth in the Appendix, p. 1a. The opinion of the United States District Court for the Middle District of Tennessee dated April 30, 1998 is set forth in the Appendix, p. 9a. Both decisions are unreported.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The jurisdiction of the Court of first instance is 28 U.S.C.A. § 1331(a). The United States Court of Appeals for the Sixth Circuit issued its decision in this case on July 14, 1999. Panel hearing and rehearing en banc were not requested. This Petition was timely filed within 90 days of the Sixth Circuit Court's decision, and is thus timely.

CONTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

V Amendment

No person shall . . . be deprived, life, liberty, or property, without due process of law;

STATEMENT OF THE CASE

Former landowners of property in Columbia, Tennessee who sold their property to TVA under the threat of eminent domain, William Derryberry et al. (hereinafter "former landowners") sued the Tennessee Valley Authority and the United States of America (hereinafter "TVA") alleging that TVA acted without proper authority in purchasing their property under threat of eminent domain, and for fraud, deceit and negligent misrepresentation. The former landowners alleged that TVA obtained congressional approval for the Columbia Dam project by distorting the cost-benefit studies so that the benefits outweighed the costs as required by the TVA Act of 1936 and the Flood Control Act of 1936. In support of the former landowners' claims, the former landowners sought review of the distorted cost-benefit studies which they allege partially constitute the basis for their causes of action. The former landowners' causes of action for fraud and deceit were founded on the misrepresentations of TVA to the former landowners directly as well.

TVA filed a motion to dismiss arguing that the former landowners failed to state a cause of action upon which relief can be granted because the cost-benefit studies were not subject to judicial review. The District Court found that the former landowners' Amended Complaint was based exclusively on the cost-benefit studies. The District Court granted the TVA's Motion to Dismiss finding that the cost-benefit studies were not subject to judicial review. Judgment was entered on April 30, 1998. The former landowners timely filed their Notice of Appeal on May 26, 1998. The Court of Appeals affirmed the District Court's opinion on July 14, 1999.

ARGUMENT

I. WHETHER COST-BENEFIT STUDIES APPROVED BY CONGRESS ARE SUBJECT TO JUDICIAL REVIEW AFTER THE INTENDED PROJECT HAS FAILED

The former landowners submit that the cost-benefit reports written and published by TVA are judicially reviewable because the former landowners are basing their claims, at least partially, on the cost-benefit studies of TVA after the project has been abandoned and the analyses have proven to be false or inaccurate.

The District Court and Court of Appeals relied upon certain cases which addressed the nonreviewability of cost-benefit studies prepared for Congress in reaching its decision. None of the cases addressed the reviewability of cost-benefit studies after the proposed project has been abandoned or failed. All of the cases cited by the District Court and Court of Appeals address the nonreviewability after approval and before or during construction. None of these cases addresses the reviewability of cost-benefit studies after approval and after abandonment of the approved project. The District Court and Court of Appeals cited Oklahoma ex rel. *Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 527-28, 61 S. Ct. 1050, 85 L. Ed. 1487 (1941) in which the Supreme Court rejected a claim that a cost-benefit study prepared for Congress in connection with authorizing a reservoir project was reviewable by the judiciary.

The rule of the judicial nonreviewability of cost-benefit studies is not absolute and the former landowners submit that it is not applicable in this instance. In *South Louisiana Environmental Council, Inc. vs. Sand,* 629 F. 2d

1005 (5th Circuit 1980), the Fifth Circuit Court of Appeals addressed the issue of the reviewability of cost-benefit analyses and ratios. The Fifth Circuit Court of Appeals recognized that the assessment of purely economic costs and benefits where the determination of agency action is essentially a question of policy has traditionally been considered within the exclusive province of Congress, *Oklahoma v. Guy F. Atkinson Co.*, 313 U.S., 508, 527-28, 61 S. Ct. 1050, 1060-61, 85 L. Ed. 1487 (1941). The Court went on to explain, however, "that upon the enactment of the National Environmental Policy Act, also known as the NEPA, the Courts, including the Fifth Circuit, began to require some judicial review of agency determination of economic benefits. *Sierra Club v. Callaway*, 499 F. 2d 982, 991-92, (5th Cir. 1974): *Calvert Cliffs Coordinating Committee vs. United States Atomic Energy Commission*; 449 F. 2d 1109, 1123 (D.C. Cir. 1971); *Environmental Defense Fund v. Froehlke*, 473 F. 2d 346, 356 (8th Cir. 1972). The Fifth Circuit Court of Appeals stated that "the National Environmental Policy Act permits, at most, narrowly focused indirect review of the economic assumptions underlying a federal project described in an impact statement".

In order to fully appraise the potential environmental harms of the proposed project, they must be weighed against the economic benefits of that project. This was done in this case by the use of a cost-benefit ratio. In order for a reviewing court to determine whether an agency has complied with NEPA by giving "a hard look" at the environmental considerations, the court must also consider whether the economic considerations, against which the environmental considerations are weighed, were so distorted as to impair fair consideration of those environmental consequences. Without such a showing there is no review of economic benefits. If the Plaintiff does make such a showing, however, *Vermont*

Yankee Nuclear Power Corporation v. National Resources Defense Council, Inc., 435 U.S. 519, 98 S. Ct. 1197 (1978) requires that the court not make an entirely independent review of the economic benefits claimed by the agency, but only determine whether an actual balance of costs and benefits struck by the agency according to the standards of § 101 and § 102 of NEPA was arbitrary or clearly gave insufficient weight to environmental factors. *EDF v. Froehlke*, 473 F. 2d at 356. *See also Calvert Cliffs*, 449 F. 2d at 1115, *Environmental Defense Fund v. Corps of Engineers (Tennessee-TomBigbee)*, 492 F. 2d 1123, 1139-40, N. 33 (5th Circuit 1974).

In this case, it was error for the court to dismiss the former landowners' Amended Complaint because the Amended Complaint not only set forth sufficient facts to prove a distorted cost-benefit ratio but also stated that TVA had abandoned the project. The former landowners submit that this is sufficient information to permit the court to conduct a review of the cost-benefit studies. In this case, however, the project was abandoned. As a matter of law, the former landowners should be able to seek review of the numbers presented by TVA, because TVA has admitted that the cost-to-benefit ratio is not in statutory compliance by having abandoned the project. This distinguishes this case from any other cases relied upon by the District Court or the Sixth Circuit Court of Appeals.

None of the cases cited and relied upon by the District Court or Court of Appeals are on point. The former landowners are seeking to review the cost-benefit studies to prove that the project should have never been undertaken. This is not to assert or substitute the District Court's judgment for an agency decision which is in its discretion which is the intent of the rulings in *Oklahoma ex rel. Phillips*

v. Guy F. Atkinson Co., 313 U.S. 508, 61 S. Ct. 1050, 85 L. Ed. 1487 (1941) and *Vermont Yankee Nuclear Power Corporation v. National Resources Defense Council, Inc.*, 435 U.S. 519, 98 S. Ct. 1197 (1978).

The former landowners are seeking an exception to the judicial nonreviewability rule. The former landowners are not seeking review as a substitution of judgment of the agency's actions or to substitute its discretion, but since the TVA has admitted its failure to comply with the mandated cost-benefit ratio by abandoning the Columbia Dam project, the former landowners are seeking to use the cost-benefit studies in support of their causes of action. The cases relied upon by the District Court and the Court of Appeals are not on point and are inapplicable.

To deny judicial review of the cost-benefit studies after the project has been abandoned violates the doctrine of the separation of powers by permitting the executive and legislative branches to regulate or to prohibit judicial review by an Article III Court. The TVA Act of 1936 does not have a provision that suggests that Congress does not intend judicial review of the agency's cost-benefit studies after the policy decisions have been made and abandoned such as the decision to build the Columbia Dam. The cases relied upon by the District Court and Court of Appeals in support of the District Court's ruling that the cost-benefit studies are nonreviewable apply only to the limited instances of the reviewability of cost-benefit studies wherein the objective was to "second-guess" or substitute the court's judgment for that of the agency and/or the Congress. *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 61 S. Ct. 1050, 85 L. Ed. 1487 (1941) and *Vermont Yankee Nuclear Power Corporation v. National Resources Defense Council, Inc.*, 435 U.S.

519, 98 S. Ct. 1197 (1978). This is not the reason for judicial review in this matter.

The sole purpose of the former landowners relying on the cost-benefit studies is to prove that the actions of the TVA were fraudulent and deceitful or, at a minimum, capricious, and negligent. The difference in the proposed use by the former landowners and the attempted review in the case cited by the District Court in its Order is that the agency in this instance has already abandoned the Columbia Dam project. The effect of judicial review of the cost-benefit studies in this case is not to substitute the judgment of the District Court for that of the agency or the Congress and invade the respective spheres of the Executive or Legislative branches, but rather, to exercise a function which is exclusively within the judicial branch. If the judicial branch cannot review the cost-benefit studies after the TVA has abandoned the project, the former landowners have no realistic forum to which to turn to seek a remedy for their injuries.

CONCLUSION

The lower courts erred in applying the rule of judicial nonreviewability of cost-benefit studies to the facts of the Petitioners' case because the intended project approved by Congress had been abandoned. The public policy concern of not allowing the Courts to interfere in Agency action after Congressional approval is obtained, as set forth in Oklahoma ex rel. *Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 61 S. Ct. 1050, 85 L. Ed. 1487 (1941), should not be expanded to protect negligent or fraudulent Agency action after it has been abandoned or failed.

This Honorable Court must grant this Petition for Certiorari so that it may clarify and limit the extent to which

the doctrine of the judicial nonreviewability of agency action is applied to cost-benefit studies presented to, and approved by, Congress.

Respectfully submitted,

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(any footnotes trail end of each document)

WILLIAM E. DERRYBERRY, et al., Plaintiffs-Appellants, v. TENNESSEE VALLEY AUTHORITY; UNITED STATES of AMERICA, Defendants-Appellees.

No. 98-5740

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1999 U.S. App. LEXIS 16183

July 14, 1999, Filed

NOTICE:
[*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 206 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 206 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

COUNSEL:
For WILLIAM E. DERRYBERRY, et al., Plaintiffs - Appellants: G. Kline Preston, Paul J. Bruno, Nashville, TN.

For TENNESSEE VALLEY AUTHORITY, UNITED STATES OF AMERICA, Defendants - Appellees: Harriet A. Cooper, Ronald E. Klipsch, Robert C. Glinski, Asst. Gen. Counsel, Tennessee Valley Authority, Knoxville, TN.

JUDGES:

OPINIONBY:
R. GUY COLE, JR.

OPINION:

OPINION

R. GUY COLE, JR., Circuit Judge. The plaintiffs appeal the district court's dismissal of their class action suit alleging various fraud and constitutional claims in connection with congressional approval of the Tennessee Valley Authority Duck River Project. In dismissing the action, the district court held that the cost-benefit reports [*2] prepared for Congress' review during the approval process, upon which the plaintiffs rely to establish their claims, were not subject to judicial review. For the following reasons, we AFFIRM the district court's decision.

I.

The Tennessee Valley Authority ("TVA") is a corporate, federal agency created by the Tennessee Valley Authority Act, *16 U.S.C. § § 831*-831dd (1994) ("the Act"). The Act authorizes the TVA to acquire property by either purchase or eminent domain to carry out the provisions and purposes of the Act. It also empowers the TVA to build dams and reservoirs, to improve navigation and flood control, and to further the development of natural resources of the Tennessee River drainage basin, in order to foster the proper economic, physical, and social development of the Tennessee Valley. See *16 U.S.C. § § 831c*(j), 831h-1, 831u.

In 1964, a group of citizens sought the TVA's assistance in relation to certain problems regarding the Duck River, which is approximately 290 miles long and traverses a number of counties in middle Tennessee. With the assistance of the Upper Duck River Development Agency, created by the Tennessee [*3] General Assembly, the TVA began

Tennessee [*3] General Assembly, the TVA began designing plans to develop the water resources in the Duck River region. The plan for the Duck River Project, completed in 1968, contemplated the building of two dams, the Columbia and Normandy Dams, as well as the development of Duck River for various aquatic activities.
In January 1969, the TVA submitted its plan to Congress, which appropriated initial funds for the project on December 11, 1969, and made further appropriations for the fiscal years 1971 through 1974. Pursuant to its authority under the Act, the TVA began acquiring property either through purchase or condemnation for the Duck River Project. Four years after it approved the Duck River Project, Congress enacted the Endangered Species Act ("ESA"). See *16 U.S.C. § § 1531*-1544 (1994). Section 7 of the ESA required all federal agencies, including the TVA, to consult with the Fish and Wildlife Service to ensure that their actions did not jeopardize the continued existence of an endangered species, or result in the destruction or modification of their habitat. In the late 1970's, the Fish and Wildlife Service issued an opinion letter stating that completion of the [*4] Columbia Dam would jeopardize the existence of two endangered mussel species. Construction of the dam halted and never resumed. n1 In 1995, the TVA published a notice in the Federal Register indicating that it intended to prepare an Environmental Impact Statement to consider the potential environmental effects of various alternative uses for the land which had been acquired for the Columbia Dam portion of the project. There is no indication in the record whether alternative plans have been finalized for the use of the Duck River property.

Following the TVA's announcement, plaintiffs, landowners whose property was acquired by the TVA for the Duck River Project, filed a complaint in district court. They

violation of their rights under the Fifth and Fourteenth Amendments to the United States Constitution. At the heart of plaintiffs' claims are the cost-benefit reports submitted to Congress during the approval process. Specifically, plaintiffs contend that the cost-benefit reports submitted to Congress contained fraudulent and negligent misrepresentations. They argue that because approval of the project was based on false information, acquisition of their property was unauthorized.

On December 22, 1997, the defendants, the TVA and the United States, filed a motion for dismissal or, in the alternative, for summary judgment. In their motion, the defendants contended that the cost-benefit reports underlying the plaintiffs' claims were not subject to judicial review because Congress relied on the reports in deciding whether to approve the Duck River Project. In the alternative, the defendants argued that the plaintiffs' [*6] claims were barred by the applicable statutes of limitations and that the plaintiffs failed to state a claim upon which relief could be granted.

On April 30, 1998, the district court granted the defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that the cost-benefit reports that constituted the basis for the plaintiffs' claims were not subject to judicial review. In dismissing the complaint, the district court did not address the defendants' alternate grounds for dismissal. This timely appeal followed.

II.

A.

Dismissal of a complaint under Fed.R.Civ.P. 12(b)(6) is a question of law subject to de novo review. See *Sistrunk v. City of Strongsville, 99 F.3d 194, 197 (6th Cir. 1996).* While courts will review the constitutionality of congressional action, courts have traditionally refused to

While courts will review the constitutionality of congressional action, courts have traditionally refused to review the accuracy and wisdom of legislative decisions made pursuant to a constitutionally valid exercise of Congress' authority. n2 See *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, 435 U.S. 519, 558, 55 L. Ed. 2d 460, 98 S. Ct. 1197 (1978); Oklahoma v. Atkinson, 313 U.S. 508, 534, 85 L. Ed. 1487, 61 S. Ct. 1050 (1941).* [*7] In particular, courts have remained reluctant to review decisions of Congress on whether to appropriate funds for specified projects. See *Atkinson, 313 U.S. at 527.* Because those decisions concern issues of policy, such as the wisdom, effectiveness, and need of a particular project, they are better left to the legislature, not the judiciary. See id.

Courts have used this reasoning not only to preclude judicial review of congressional policy decisions, but also to deny judicial review of data prepared for the use of Congress in deciding whether to authorize a project. See *Izaak Walton League v. Marsh, 210 U.S. App. D.C. 233, 655 F.2d 346, 358 (D.C. Cir. 1981);* [*8] *Environmental Defense Fund v. Marsh, 651 F.2d 983, 1003 (5th Cir. 1981); Concerned Residents of Buck Hill Falls v. Grant, 537 F.2d 29, 35 (3rd. Cir. 1976); Duck River Preservation Ass'n. v. TVA, 410 F. Supp. 758, 766 (E.D. Tenn. 1974).* A cost-benefit analysis is one example of underlying data that this court will not review. The determination of economic costs and benefits is a matter of legislative judgment, and thus the legislative branch, not the judiciary, is better suited to determine the adequacy, accuracy, and validity of the information contained in those reports. See *Izaak Walton, 655 F.2d at 358.* n3

B.

portion of the Duck River Project has been abandoned. n4 Therefore, any review of the cost-benefit reports would not require the court to substitute its own judgment for that of Congress. We disagree.

It is not the subsequent status of a project that precludes or permits review of data on which Congress relied; it is whether Congress acted, i.e., authorized a project, that precludes judicial review based upon the constitutional separation of powers of the Congress and the Judiciary. See *Atkinson, 313 U.S. at 528.* Looking at the subsequent abandonment of a project as evidence that the project should not have been approved in the first instance necessarily requires the court to determine whether Congress made a mistake. In that case, the court would still be reviewing a policy decision of Congress. See *id. at 527-28* (stating that concerns about the wisdom, effectiveness, and need of a project involve questions of policy, not constitutionality and, as such, are issues for Congress not the courts). The appropriate forum for raising challenges to the information contained in the cost-benefit reports is a congressional hearing held prior to congressional approval, not this court. See *Izaak Walton, 655 F.2d at 358.* As the court stressed in Izaak Walton, individual authorization of a project by Congress removes the accuracy of the [*11] underlying data from judicial review. See id. Because Congress individually authorized the Duck River Project, the accuracy of those cost-benefit reports is not subject to our review. n5 See id. Accordingly, we AFFIRM the district court's dismissal of the plaintiffs' complaint. n6

Footnotes

n1 Following the Fish and Wildlife Service opinion letter, the TVA initially attempted to conserve the mussels by

Footnotes

n1 Following the Fish and Wildlife Service opinion letter, the TVA initially attempted to conserve the mussels by transplantation. Transplantation proved not to be a viable option, however, as both the TVA and the Fish and Wildlife Service agreed that the program had not met the necessary criteria for success. Information about the status of the dam, including the fact that construction had stopped because of the discovery of endangered species in the river, was reported to the public throughout the 1980s and 1990s.

n2 The Commerce Clause grants Congress the power to regulate or control all navigable waters and their tributaries. See *Oklahoma v. Atkinson, 313 U.S. 508, 516, 523, 85 L. Ed. 1487, 61 S. Ct. 1050 (1941).* Therefore, the approval of the Duck River Project was a constitutionally valid exercise of Congress's powers.

n3 Though cost-benefit reports are generally precluded from review, courts have carved out a limited exception for reports prepared for the purpose of complying with the National Environmental Policy Act, *42 U.S.C. § 4321* et seq. (NEPA). See *South Louisiana Environmental Council, Inc. v. Sand, 629 F.2d 1005, 1012-15 (5th Cir. 1980); Marsh, 651 F.2d at 1001*(citing Sand as holding that cost-benefit reports prepared for the purpose of NEPA are subject to judicial review). Because NEPA has established specific procedures to be followed, courts are capable of determining objectively whether federal officials have fulfilled the mandate of Congress. See *Duck River Preservation Ass'n, 410 F. Supp. at 762.* As such, reviewing compliance under NEPA does not require inquiry into the wisdom and validity of legislative policy decisions. See id.

alleged a colorable constitutional violation. The plaintiffs' complaint does not clearly explain the nature of their Fifth Amendment cause of action, but its use of the quotation marks around "governmental purpose" (J.A. 94) suggests the possibility that the plaintiffs also claim that the TVA took land for purely private use--a taking that would also offend the Constitution. See, e.g., *Thompson v. Consolidated Gas Utils. Corp., 300 U.S. 55, 80, 81 L. Ed. 510, 57 S. Ct. 364 (1937).* The plaintiffs do not appear to meet the heavy burden of showing that the taking did not rationally relate to a public purpose, however. See, e.g., *Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 241, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984).*

n5 The very cost-benefit reports at issue in this case have previously been held to be non-reviewable in Duck River Preservation Ass'n. See *410 F. Supp. at 766* (holding that costs-benefits reports calculated in the manner prescribed by the Flood Control Act of 1936 were not subject to judicial review).

n6 Although the defendants raise alternative bases for affirming the dismissal of the complaint, those alternative grounds are predicated on the reviewability of the cost-benefit reports. Because considerable case law holds these reports to be non-reviewable, we need not address these alternative grounds for dismissal.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

WILLIAM E. DERRYBERRY, et al.

v

TENNESSEE VALLEY AUTHORITY,
et al.

No. 1-97-0123
Judge Higgins

Filed 4-30-98

ORDER

In accordance with the memorandum contemporaneously entered, the defendants' motion (filed December 22, 1997; Docket Entry No. 8) to dismiss is granted. Accordingly, this action is dismissed with prejudice.

Entry of this order shall constitute the judgment in this action.

It is so ORDERED.

Thomas A.
Higgins
United States
District Judge

MEMORANDUM

The Court has before it the defendants' motion (filed December 22, 1997; Docket Entry No. 8) to dismiss or, in the alternative, for summary judgment; their memorandum (Docket Entry No. 9) in support; the plaintiffs' response (filed January 26, 1998; Docket Entry No. 14); and their memorandum (Docket Entry No. 15) in support.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (a).

For the reasons discussed below, the Court shall grant the defendants' motion to dismiss.

I.

The plaintiffs are former landowners(fn1) who owned property during the 1970's in the area of the Columbia Dam in Maury County, Tennessee. The defendant, the Tennessee Valley Authority, is a corporate federal agency created by the Tennessee Valley Authority Act. The TVA Act authorizes the TVA, in the name of and as agent for the United States, to acquire real property by purchase or eminent domain for the building of damn and reservoirs, for improving navigation and flood control, and for the development of the natural resources of the Tennessee River drainage basin.

In the late 1960s, the TVA proposed the Duck River Project to Congress, which included the construction and operation of the Normandy Dam and the Columbia Dam on the Duck River. In its proposal of the project to Congress, the

WA prepared a series of planning reports, including cost-benefit studies. Congress first appropriated funds for the project in 1969. In 1972, the defendants began to acquire property for the Columbia Dam portion of the project, and began construction of the Dam in 1973. By early 1979, the defendants had acquired all of the property formerly owned by the plaintiffs or their predecessors. The defendants acquired four of these tracts of land through condemnation proceedings, while the rest were purchased from the plaintiffs.

Construction on the Columbia Dam was stopped, however, in September of 1983, as a result of the discovery of endangered mussels in the Duck River. At the time construction on the Dam was halted, the Columbia portion of the project was only 45 percent complete, although the concrete portion of the dam was over 90 percent complete. In February of 1995, the TVA published a notice in the Federal Register that it intended to prepare an Environmental Impact Statement to consider the potential effects of various alternative uses for the land that it had acquired for the Columbia Dam, The TVA released a draft of the EIS in January of 1997.

The plaintiffs contend that the cost-benefit studies prepared in the 1960s, which Congress relied on in appropriating funds to the flA for the Construction or the Columbia Dam, were false and misleading and violated the Flood Control Act of 1936 and the WA Act. The plaintiffs also allege that (1) the TVA engaged in fraud and negligent misrepresentation; (2) the TVA acted beyond the scope of its authority; and (3) a "taking" of their property resulted in

violation of the Fifth and Fourteenth Amendments to the Constitution.

The defendants move for dismissal of this case for failure to state a claim, pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure, on the grounds that (1) the cost-benefit studies are not subject to judicial review as a matter of law; (2) the plaintiffs' claims are barred by the statute of limitations; and (3) the plaintiffs have not stated claims of fraud, negligent misrepresentation, or the taking of their property.fn2

When examining a Rule 12(b) (6) motion to dismiss, all the allegations in the plaintiff's complaint are accepted as true, and the complaint is construed liberally in favor of the party opposing the motion. Miller v. Currie, 50 F.3d 373, 377 (6th Cir 1995)

The Supreme Court of the United States has explained that "a complaint should riot be dismissed for failure co state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v, Gibson, 355 U.S. 41, 45-56, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957).

III.

The defendants argue that the cost-benefit studies on which the plaintiffs base their claims are not subject to judicial review. The defendants further contend that "[a]ll of the counts of the complaint, including plaintiffs' claim for fraud (Count I), their claim that TVA acted beyond the scope

of its authority (Count II). their claim of negligent misrepresentation (Count III), and their claim of violations of the taking clause of the Fifth Amendment (Count IV)--rest on plaintiffs' contentions about the validity and accuracy of these cost-benefit analyses." Defendants' memorandum (Docket Entry No. 9) at 12-13. The defendants cite numerous cases in support of their position.

The plaintiffs do not dispute that all of thei claims are based on the cost-benefit studies which TVA prepared included in their planning reports presented to Congress, and the Court, in fact, finds that these cost-benefit studies constitute the basis of all of the plaintiffs' claims The plaintiffs argue, however, that the cases cited by the defendants are not applicable because the plaintiffs in those cases were challenging the specific numbers which made up the cost-benefit studies. The plaintiffs in the instant case contend that judicial *review* is available in their situation because they are challenging "the accuracy and truthfulness of the general representations made by the TVA to them." Plaintiffs' memorandum (Docket Entry No. 15) at 27. The plaintiffs cite no case law in support of their position.

Courts have traditionally held that cost-benefit studies which are prepared for Congress are not subject to judicial review. The Supreme Court of the United States determined, in a case involving a reservoir project, that it was not for the Courts "to determine whether the resulting benefits to commerce as a result of this particular exercise by Congress of the commerce power outweigh the costs of the undertaking." Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 528, 61 S.Ct. 1050, 1061, 85 L.Ed. 1487,

1501 (1941). In Izaak Walton Leaaue of America v. Marsh, 655 F.2d 346 (D.C. Cir. 1981), the Court held:

> In deciding whether authorization should be granted, Congress will itself review the analysis and determine whether it has been conducted properly. Once it has made this determination, the courts should not interfere.
> It has consistently been held that determination of economic costs and benefits is a matter of legislative judgment and that, since the analyses are performed for Congress, the legislative branch rather than the judiciary is best suited to review their adequacy.

Id. at 358. See also County of Venon v. United States, 933 F.2d 532 (7th Cir. 1991) (following Izaak and holding that the County's challenge to the accuracy of the cost—benefit analysis in the report to Congress was nonreviewabie).

Notwithstanding the importance of the decisions of the Supreme Court and the Court of Appeals on this subject, the Court finds most influential the case of Duck River Preservation Ass'n v. Tennessee Valley Authority, 410 F. Supp. 759 (E.D. Tenn. 1974), aff'd, 529 F.2d 524 (6th Cir. 1976), in which the very cost-benefit studies at issue in this case were found to be nonreviewable. In Duck River, an environmental group challenged the environmental impact statement prepared for the Duck River project. The group specifically challenged the economic data on which the EIS was based because the data had not been updated after the project was approved by Congress. The Court rejected the plaintiff's argument and held that the "calculation [in the EIS] was accomplished in the maimer required by the Flood Control Act of 1936 and Senate Document no. 97, is a legislative matter, and is not subject to judicial review." Id. at 766 (citation omitted). Likewise, in the instant case, the plaintiffs have not shown why these same cost benef it

studies, which were previously found by a district court to be in compliance with the Flood Control Act and which were considered a legislative matter, are now subject to judicial review.

The plaintiffs seem to argue that, because they are challenging the general representations made by the TVA as being false and misleading, as opposed to challenging specific numbers, the cost-benefit studies are reviewable.fn3 However, in Environmental Defense Fund Inc. v. Alexander, 501 F. Supp, 742 (N.D. Miss. 1980), rev'd on other grounds, 651 F.2d 983 (5th Cir. 1981), the court rejected a similar argument that a waterway project's benefits had been "greatly inflated and falsely overstated and costs grossly understated" and that the defendants had "deliberately misrepresented the benefits and costs to the public and Congress." Id. at 754. The court noted that "most courts have ruled there is no independent right of judicial review of statutes providing for benefit/cost computations by agencies for congressional review and action on public works projects," id at *756,* and thus held that the plaintiffs had failed to state claims upon which relief could be granted. Id. at 760.

The Court finds that the plaintiffs in this case have failed to state claims upon which relief may be granted as their claims are based on cost-benefit studies which are not subject to judicial review. Accordingly, the Court shall grant the defendants' motion to dismiss.

An appropriate order shall be entered.

Thomas A.
Higgins
United States
District Judge

fn1The plaintiffs also include heirs and representatives of toner landowners.

fn2As the Court finds that the motion to dismiss shall be granted on the basis that the cost-benefit studies at issue in this case are not subject to judicial review, the court has not addressed the defendants' other grounds for dismissal.

fn3Specifically, tue plaintiffs risk the Court to "review the accuracy of the representations of TVA and compare those representations with the facts as they now are to determine the accuracy of the representations." Plaintiffs' memorandum (Docket Entry No. 15) at 29. The plaintiffs focus on three areas in which they allege the TVA misrepresented facts to them. The first area involves the TVA's representations in its planning reports that over 3000 jobs would be created as a result of the project, which never came to fruition. The second area involves the TVA's representation that the project would result in industrial growth to the area, including the expansion of the phosphate industry, which never occurred. The third area involves the TVA's representation that lake front property created by the reservoirs would increase in value as a result of the project.